

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

JOSEPH VICEDOMINE and
TRICIA VICEDOMINE, d/b/a
LAKE ANNE COFFEE HOUSE, d/b/a
LAKE ANNE EXECUTIVE SUITES,
d/b/a SMUGGLERS COVE, d/b/a
TEMP CLUB, INC.,

Chapter 7

Case No.: 02-15586

Debtors.

EUROCRAFTERS, LTD.,

Plaintiff,

Adv. Pro. No.: 02-90351

v.

JOSEPH VICEDOMINE and
TRICIA VICEDOMINE, d/b/a
LAKE ANNE COFFEE HOUSE, d/b/a LAKE
ANNE EXECUTIVE SUITES, d/b/a
SMUGGLERS COVE, d/b/a TEMP CLUB, INC.,

Defendants.

APPEARANCES:

Joseph Vicedomine and Tricia Vicedomine, *Pro Se*
95 Gundrum Pt. Rd.
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Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

Memorandum-Decision and Order

This matter is before the court pursuant to an adversary proceeding commenced by Eurocrafters, Ltd. (“Eurocrafters” or “Plaintiff”) against Joseph and Tricia Vicedomine (the “Debtors”) seeking to have a prepetition state court judgment debt (the “Debt”) deemed nondischargeable under 11 U.S.C. § 523(a)(2)(A). The parties have engaged in significant pre-trial proceedings, thereby limiting the scope of this decision to whether Eurocrafters proved, at the trial held on October 6, 2003, that the Debtors fraudulently obtained its services.¹

Jurisdiction

The court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1), and (b)(2)(I).

Facts

From the parties’ pleadings, memoranda, including the Joint Stipulation of Facts (the “Stipulation”), Pretrial Statements, and Exhibits, and trial testimony, the court makes the following findings of fact pursuant to Fed. R. Civ. P. 52, made applicable to this proceeding by Fed. R. Bankr. P. 7052.

¹ Eurocrafters’ state court suit consisted of two counts, one for breach of contract against Smugglers Cove, L.L.C. (“Smugglers Cove”), and the other for actual fraud against the Debtors individually. Judgment was rendered by default on both counts by the Virginia Circuit Court and affirmed by the Virginia Supreme Court. Following the Debtors’ Chapter 7 filing on August 30, 2002, Eurocrafters sought to invoke the doctrine of collateral estoppel as grounds for excepting the Debt from discharge pursuant to § 523(a)(2)(A). The Debtors filed a motion to dismiss the adversary proceeding, and the court, *sua sponte*, converted the motion to one for summary judgment pursuant to Fed. R. Bankr. P. 7056. By oral decision issued on July 3, 2003, the court held that the issue of actual fraud was not actually litigated and Eurocrafters could not rely on the state court judgment in this adversary proceeding. Partial summary judgment, therefore, was granted in favor of the Debtors. The court, in its decision, however, indicated that it would treat the allegations of fraud alleged in the state court complaint as a second cause of action in this proceeding in order to facilitate a decision on the merits. Familiarity with this decision is assumed. On July 23, 2003, Eurocrafters filed an Amended Complaint alleging only actual fraud under Virginia law, without reference to bankruptcy law. Because “[a]ctual fraud is defined in Virginia as ‘ . . . a misrepresentation of a material fact, knowingly and intentionally made, with the intent to mislead another person, which that person relied upon with the result that he was damaged by it’ (Pl.’s Post-Trial Mem. of Findings of Fact and Conclusions of Law at 3 (citing Virginia Model Jury Instructions No. 39.000)), and the elements are identical, the court will treat the action, as amended, as one for false representation under § 523(a)(2)(A). *See Hess v. Mastrodonato*, 2001 U.S. Dist. LEXIS 24571, *7 (W.D.N.Y. 2001) (reciting the elements for false representation under § 523(a)(2)(A)).

The Debtors were the sole owners and operators of Smugglers Cove, a limited liability company organized under the laws of Virginia. On or about March 21, 2000, Smugglers Cove entered into a Construction Contract (the “Contract”) with Eurocrafters for improvements to commercial space leased and occupied by Smugglers Cove. (Pl.’s Ex. 1.) Pursuant to the Contract, the Debtors were to make lump sum progress payments to Eurocrafters, with the entire balance to be paid not later than one hundred and fifty (150) days from the date the work began. The Contract also provided for the accrual of interest on the unpaid balance on the date of completion at a rate of 1% per month. (Pl.’s Ex. 1 at 2, ¶ 6.) Eurocrafters commenced work in the spring of 2000, and the Debtors were unable to make the initial progress payment due under the Contract. (Trial transcript (hereinafter “Tr.”) at 15.)

According to George Drosos, Eurocrafters’ owner and chief witness, the Debtors advised him on several occasions that they personally would pay Eurocrafters the full amount due by Smugglers Cove through proceeds obtained by the sale of their residence in Reston, Virginia (the “Residence”), or by either refinancing or obtaining a second mortgage on their investment property in Corolla, North Carolina (the “Carolina Property”). (Tr. at 17.) Based on the Debtors’ oral representations, Eurocrafters continued to perform under the Contract until completion of the project on or about May 6, 2000. Between the summer and fall of 2000, the Debtors verbally continued to assure Mr. Drosos that Eurocrafters would be paid once they received the proceeds from either property. Eurocrafters, believing that payment was forthcoming, did not immediately begin collection efforts, including perfection or enforcement of its statutory lien rights. On or about September 6, 2000, Eurocrafters sent a Statement to Smugglers Cove for an outstanding balance of \$35,926.80. (Pl.’s Ex. 2.)

The Debtors sold the Residence on October 16, 2000, but they did not realize any equity as a result of that sale. (Tr. at 19.) After having notified Eurocrafters that the sale did not generate funds for payment of the Debt, the Debtors spoke with Catherine Drosos, a licensed real estate broker, about refinancing the Carolina Property. Ms. Drosos testified that the Debtors presented her with a Uniform Residential Loan

Application and HUD-1 Settlement Statement for the Carolina Property (Pl.'s Exs. 9 and 10), from which she learned that the Debtors had already refinanced the Carolina Property and closed on the loan on May 3, 2000. (Tr. at 31.) From that transaction, the Debtors obtained cash in the amount of \$70,591.08. (Pl.'s Ex. 10.) The closing occurred just three days before Eurocrafters completed the project, and the Debtors used \$12,000 of the closing proceeds to pay Eurocrafters. (Pl.'s Ex. 2.)

Eurocrafters also inadvertently learned that the Debtors's landlord, Robert E. Simon, Jr., had entered into a Financing Agreement with the Debtors for a \$50,000 loan to be used for completion of construction (Tr. at 20-21). The loan was secured by an unrecorded Note and Deed of Trust dated March 15, 2000 against the Carolina Property. (Pl.'s Exs. 11, 12 and 13.) Based upon her review of the Debtors' financial documents pertaining to the Carolina Property, Mrs. Drosos concluded that the Carolina Property was oversecured and that there was no remaining equity for the Debtors to draw upon.²

The Debtors did not disclose either of these transactions to Eurocrafters. (Tr. at 18-19.) Mrs. Drosos learned about the refinancing of the Carolina Property from Mr. Simon's attorney, David Estabrook, Esq. (Tr. at 32), but only after Eurocrafters had completed construction. Similarly, Eurocrafters did not learn of Mr. Simon's loan until he initiated an unlawful detainer action against the Debtors in January 2001. (Tr. at 32.)

The Debtors did not sign the Contract other than in their capacity as officers of Smugglers Cove (Stip. at 2, ¶ 8), but on or about December 1, 2000, they wrote to Eurocrafters indicating that they nonetheless had every intention of paying Eurocrafters in full and offered to pay \$1,000 a month until they refinanced their home.³ (Pl.'s Ex. 7.) It is Eurocrafters's position that this letter was merely an

² The unrecorded Note would not factor into the amount of equity in the Carolina Property; this fact, however, is neither here nor there for purposes of this decision.

³ It is unclear what property the Debtors were referring to in this December 2000 letter since they had sold the Residence in October 2000. There is no testimony in the record to indicate where the Debtors resided at the time the letter was written.

acknowledgment of the false representations previously made by the Debtors to induce Eurocrafters to continue performance under the Contract. (Tr. at 5.)

In January 2001, Eurocrafters commenced suit against Smugglers Cove in the Commonwealth of Virginia.⁴ By the time judgment was rendered, the Debtors had relocated to New York. Shortly thereafter, they filed for bankruptcy protection in this court.

At trial, the Debtors denied that they, in their individual capacities, ever intended to defraud Eurocrafters. They further testified that Smugglers Cove intended to satisfy its corporate indebtedness to Eurocrafters until it became apparent that neither Smugglers Cove nor the Debtors personally had the financial means to do so. (Tr. at 52, 65.) In fact, Tricia Vicedomine testified that they attempted to obtain assistance from the Small Business Administration, but were unsuccessful because Smugglers Cove did not have any liquid assets which could be used as collateral for a loan. (Tr. at 54-56). Smugglers Cove had a twenty (20) year lease, but no ownership in the building despite having spent at least \$163,000 for improvements. As for the \$120,591.08 that the Debtors received from the refinance of the Carolina Property and the loan from Mr. Simon, Mrs. Vicedomine testified that, aside from the \$12,000 paid to Eurocrafters, the remaining proceeds were funneled back into improvements to the leased premises. (Tr. at 52.)

Arguments

Eurocrafters argues that: (1) the Debtors made oral representations, which do not implicate the Statute of Frauds under Virginia law, that they would pay Eurocrafters in full upon the sale of the Residence, or either refinance or obtain a second mortgage on the Carolina Property; (2) they knew these representations were false when made, because they had already refinanced the Carolina Property and given a second Deed of Trust against it to Mr. Simon; (3) they made the representations with the intention and purpose of deceiving Eurocrafters; (4) Eurocrafters relied on the representations when it continued to perform under the Contract, without exercising its statutory lien rights; and (5) as the proximate result of the representations

⁴ See *supra* note 1, at 2.

having been made, Eurocrafters sustained a loss or damages for which it should recover. Therefore, the Debt should be excepted from discharge pursuant to § 523(a)(2)(A).

The Debtors filed an Amended Answer denying the essential elements of fraud. First, they argue that they are not personally liable for the Debt. They contend that there is no basis for piercing the corporate veil under the law of Virginia to impose individual liability on them as principals and officers of the indebted corporation. They further argue that, unless the corporate veil is pierced, Eurocrafters should not be permitted to assert a claim against them personally.

Second, on the issue of fraud, the Debtors argue that any evidence of fraudulent intent is negated by their good faith efforts to pay Eurocrafters between May and January of 2001, when Eurocrafters commenced suit. (Tr. at 86.) During this time period, the Debtors paid Eurocrafters a total of \$21,500. (Pl.'s Ex. 2.) Moreover, the Debtors suggest that their intent must be measured as of the time of execution of the Contract. (Tr. at 65-66, 86.) Mrs. Vicedomine spoke directly to their intent at that time, which was to ensure the success of Smugglers Cove as a viable business entity within the community. (Tr. at 42.)

In sum, the Debtors argue that Eurocrafters has not, and cannot, meet its burden of proof under § 523(a)(2)(A).

Discussion

One of the primary purposes of the Bankruptcy Code⁵ is to “relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from obligations and responsibilities consequent upon business misfortunes.” *Williams v. U.S. Fid. & Guar. Co.*, 236 U.S. 549, 554-555 (1915) (citations omitted). “The procedural means to achieve this end is the voluntary petition filed under Chapter 7 of the Bankruptcy Code to ‘discharge’ an individual’s debt.” *Hess v. Mastrodonato*, 2001 U.S. Dist. LEXIS 24571, at *7 (W.D.N.Y. November 19, 2001) (citations omitted). Pursuant to § 727, a debtor who files for Chapter 7 relief is discharged from most preexisting debts. As emphasized by the Supreme Court

⁵ 11 U.S.C. § 101 *et seq.*

in *Williams and Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934), the benefit of a fresh start is reserved only for honest but unfortunate debtors. To that end, § 523(a)(2)(A) implements this fundamental bankruptcy policy that only those debts which are honestly incurred may be discharged.

Section 523(a)(2)(A) bars discharge from debts for property or services obtained by “false pretenses, a false representation, or actual fraud. . . .” 11 U.S.C. § 523(a)(2)(A). Exceptions to discharge, including this one, “must be strictly and literally construed against the creditor and liberally construed in favor of the honest debtor.” *In re Spar*, 176 B.R. 321, 326 (Bankr. S.D.N.Y. 1994). In order for Eurocrafters to prevail in this proceeding, it must prove each element of § 523(a)(2)(A) by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 286 (1991).

In this case, however, the court need not delve into § 523(a)(2)(A) because a serious question exists as to whether the Debtors are, in their personal capacity, even liable for the Debt. Eurocrafters has not established as much. The Debt did not arise from a direct transaction with the Debtors, but rather involved a transaction made directly between Eurocrafters and Smugglers Cove as corporate entities. Contrary to the insinuations of Eurocrafters, it is equally clear that the Debtors did not guarantee the Debt via their December 2000 letter. The Virginia Statute of Frauds provides that:

Unless a promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, is in writing and signed by the party to be charged or his agent, no action shall be brought in any of the following cases :

. . . .

(4) To charge any person upon a promise to answer for the debt, default, or misdoings of another.

Va. Code Ann. § 11-2(4) (2004). “To satisfy the Statute of Frauds, a writing must contain the essential terms of the agreement it memorializes.” *Janus v. Sproul*, 250 Va. 90, 91 (1995) (citing *Reynolds v. Dixon*, 187 Va. 101, 106 (1948)). “With respect to a guaranty agreement, the statute requires that the nature and extent of the undertaking, including the promise to pay the debt of another, appear on the face of the writing or the agreement is not enforceable.” *Id.* (citing *Am. Indus. Corp. v. First Merch. Nat’l Bank*, 216 Va. 396, 399

(1975)). Parol evidence is inadmissible to prove these essential terms. *Id.*

Under these rigid standards, the December 2000 letter is insufficient to defeat the bar of the statute. It does not evidence an agreement by the Debtors individually to pay for the Debt of Smugglers Cove. The reference line of the letter reads, “R.E. Eurocrafters, Ltd., Contract with *Smugglers Cove LLC*.” (Pl.’s Ex. 7) (emphasis added.) The first paragraph of the letter explicitly states, “We just want to reiterate that we have every intention of paying you in full all that remains on *our* account with you.” (Pl.’s Ex. 7.) From this alone, the court may conclude that the Debtors are speaking as principals of Smugglers Cove. The second paragraph, however, references a “second mortgage” and their ability to “refinance the house,” which is presumptively a personal asset. The document is ambiguous and, at best, memorializes the gratuitous verbal promise of the Debtors to pay for a Debt they do not owe.

In order to prevail in this proceeding, it is necessary for Eurocrafters to pierce the corporate veil which shields the Debtors from liability for the debts of Smugglers Cove. Although Eurocrafters does not speak directly to this issue, fraud is the sole ground for its case. “Fraud can be the basis for disregarding the principal of limited liability which is a hallmark of the corporate entity.” *In re Moran*, 120 B.R. 379, 387 (Bankr. W.D. Va. 1990). Thus, in order to impose personal liability, Eurocrafters must prove by a preponderance of the evidence that the Debtors defrauded Eurocrafters in obtaining for Smugglers Cove the goods and services underpinning the Debt. “The decided cases in the Fourth Circuit are uniform that both caution and reluctance should be exercised when considering a piercing of the corporate veil.” *Id.* (citing *In re Criswell*, 52 B.R. 184, 194 (Bankr. E.D. Va 1985)).

As discussed *supra*,⁶ if Eurocrafters could prove actual fraud under Virginia law sufficient to pierce the corporate veil, then it would automatically prevail on its cause of action under § 523(a)(2)(A). In determining whether Eurocrafters has done so, the court first looks to the credibility of the parties. As the court advised the parties at trial, it finds Mr. Drosos credible and believes that the Debtors did in fact make

⁶ See *supra* note 1, at 2.

the alleged oral representations. (Tr. at 86.) Thus, the first element of fraud is satisfied.

Eurocrafters, however, cannot overcome the main hurdle in this case – whether the Debtors possessed the requisite fraudulent intent. In applying a subjective standard for fraud in this case, a number of important considerations mitigate strongly against the existence of any fraudulent intent, including that the Debtors: (1) notified Eurocrafters that there were no available proceeds from the sale of the Residence (Tr. at 19); (2) attempted to work out financing options; (3) sought the assistance of Mrs. Drosos with respect to refinancing, albeit for a second time, the Carolina Property and voluntarily delivered to her the very documents which Eurocrafters relies upon as evidence of fraud; (4) paid \$12,000 of the proceeds from the May 3, 2000 refinance of the Carolina Property to Eurocrafters; (5) made several payments to Eurocrafters between the time the oral representations were first made and the date Eurocrafters commenced suit, which were credited on the Statement (Pl.’s Ex. 2); and (6) did not gain any personal benefit from the labor and services provided by Eurocrafters because they lost possession of the premises within months of Smugglers Cove’s grand opening in April 2000. In addition, it must be considered that their promises to pay Eurocrafters occurred prior to the failure of Smugglers Cove, which was their main, if not only, source of income. The nearly instant demise of Smugglers Cove could not have been foreseen or anticipated by the Debtors at the time Smugglers Cove entered into the Contract, or when the Debtors first made the representations of payment to Eurocrafters. In fact, Mrs. Vicedomine testified that the Debtors poured a substantial amount of capital into the business venture, only to forfeit it to the landlord in the end. (Tr. at 56.) After considering the mitigating factors in the aggregate, the court is not convinced that the Debtors had a present intent to deceive Eurocrafters, either when the oral representations were made or when the December 2000 letter was written.

In addition, even if the court were to discount the above analysis, Eurocrafters has not shown that any damage occurred as a direct result of the December 2000 letter. Even if the court were to find that the December 2000 letter constitutes a personal guarantee, it could not make the requisite finding that

Eurocrafters was damaged because of it. Eurocrafters concedes that its only prejudice was a two month delay in filing suit. If that letter had never been written, Eurocrafters would have filed suit in December 2000 instead of February 2001. (Tr. at 7.) More important, perhaps, is that no additional prejudice could have been caused by the December 2000 letter, because the work was already completed when the letter was written.

Conclusion

Without piercing the corporate veil, which the court cannot do in this instance, § 523(a)(2)(A) is unavailable to Eurocrafters to except the Debt from discharge. Accordingly, the relief requested is denied and the Complaint is hereby dismissed.

Dated:
Albany, New York

Hon. Robert E. Littlefield, Jr.
United States Bankruptcy Judge